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**In the Supreme Court of the United States**

OCTOBER TERM, 1983

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MILTON R. WASMAN, PETITIONER

v.

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE ELEVENTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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### **QUESTION PRESENTED**

**Whether the district court properly enhanced petitioner's sentence on retrial to take into account an intervening conviction.**

**(I)**

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## **OPINIONS BELOW**

The opinion of the court of appeals affirming petitioner's conviction and sentence on retrial (Pet. App. A1-A32) is reported at 700 F.2d 663. The opinion of the court of appeals reversing petitioner's initial conviction is reported at 641 F.2d 326 (5th Cir. 1981).

## **JURISDICTION**

The judgment of the court of appeals was entered on March 17, 1983, and a petition for rehearing was denied on June 2, 1983. Pet. App. A68-A69. The petition for a writ of certiorari was filed on August 1, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## **STATEMENT**

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of knowingly and willfully making a false statement

in a passport application, in violation of 18 U.S.C. 1542. He was sentenced to two years' imprisonment, all but six months of which was suspended in favor of three years' probation. On appeal, the conviction was reversed. 641 F.2d 326 (5th Cir. 1981). On retrial, petitioner again was convicted by a jury, but this time he was sentenced to two years' imprisonment without suspension of any portion of the sentence. The court of appeals affirmed. Pet. App. A1-A32.

1. The evidence adduced at the second trial showed that on March 1, 1978, petitioner applied for a United States passport in the name of David Hibbert Hendrick, Jr. Petitioner told the passport examiner that he had forgotten his wallet and therefore had no identification, but that his secretary would swear out an affidavit identifying him as Hendrick. Petitioner then filled out a passport application in the name of Hendrick. In addition to the false name, he gave a fictitious date of birth, place of birth, next of kin, mother and father. He also reported that he had never been married and that he had never previously been issued a passport, although, in fact, petitioner was married and possessed a current passport in the name of Wasman. Petitioner signed the passport application and swore that the statements he had made therein were true and correct to the best of his knowledge. He also informed the passport examiner that he intended to travel abroad within the next few days and that he therefore needed the passport as soon as possible. The passport was issued and petitioner's secretary picked it up the next day (Tr. 76-82, 93-96; G. Exhs. 1, 2, 6).<sup>1</sup>

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<sup>1</sup> References to the trial transcript and exhibits and to the first sentencing hearing are taken from the government's brief in the court of appeals. References to the first sentencing hearing are designated herein as "I S. Tr."; that transcript of the hearing was contained in the third volume of the supplemental record in the court of appeals ("3 S. R.").

In order to rebut petitioner's claim that he had legally assumed the name "Hendrick," the government introduced evidence showing that, after posing as Hendrick to obtain the passport, petitioner continued to use the name "Wasman" for other purposes. For instance, on the same day that he applied for the passport, petitioner also applied for a renewal of his driver's license in the name of "Wasman." He applied for a duplicate copy of the license two months later, again using the name "Wasman" (Tr. 128-130; G. Exhs. 20-22).

In defense, petitioner claimed that he needed a passport in a non-Semitic name in order to sell Florida real estate to a group of Arab investors (Tr. 194-224, 228-241, 252-259, 268, 284-289, 293-298).

2. At the sentencing hearing following petitioner's conviction at the first trial, the government advised the district court that petitioner had one prior conviction for failure to file a tax return and also was under indictment on four counts charging mail fraud (I S. Tr. 23-24). The court granted defense counsel's request that it not consider the unresolved mail fraud charges (I S. Tr. 28-29):

I don't consider pending cases in determining sentence because my theory of sentencing is simply that one can consider prior convictions, and each judge who has somebody with more [than] one conviction should consider it, not only may, but should consider prior convictions, give whatever weight that judge feels is appropriate, but if judges at the time of considering prior convictions also consider pending cases, and then if that pending case resulted in a conviction, one of the sentences would inevitably have been a pyramided sentence. Consequently, I don't consider pending cases on that basis.

The court then sentenced petitioner to two years' imprisonment, all but six months of which was suspended in favor of three years' probation (*ibid.*).

The pending mail fraud indictment subsequently was dismissed and a one-count information was substituted charging petitioner with possession of counterfeit certificates of deposit. Following his plea of *nolo contendere*, petitioner was convicted on the counterfeit certificates charge and was sentenced to two years' probation.

Thereafter, petitioner's initial conviction on the false passport charge was reversed. 641 F.2d 326 (5th Cir. 1981). Following his retrial and reconviction, petitioner was sentenced to two years' imprisonment, none of which was suspended. Pet. App. A33-A66. The court explained (*id.* at A42-A59) that it had altered petitioner's sentence to take into account his intervening conviction on the counterfeit certificates of deposit charge. The court stated (*id.* at A58):

At the time of the first sentencing, I just thought that Mr. Wasman was one of those people who couldn't see the out-of-bounds lines very clearly and didn't care too much which side of it he was on.

But, since the first sentencing hearing, petitioner had been found guilty on the counterfeit certificates charge. In the court's view, this additional conviction shed new light on petitioner's character and rendered a partially suspended sentence inappropriate. *Id.* at A42-A59.

3. The court of appeals affirmed petitioner's conviction and sentence. Specifically, the court held (Pet. App. A15) that the modification of petitioner's sentence on retrial was not motivated by judicial vindictiveness and comported with the guidelines for enhanced sentencing established by this Court in *North Carolina v. Pearce*, 395 U.S. 711 (1969):

[The district court] followed precisely the procedural steps of *Pearce*, affirmatively stating on the record his reason for enhancing the sentence, basing that reason on objective information concerning identifiable conduct of the defendant, and making the factual data on which his action was based part of the record so that its constitutional legitimacy may be fully reviewed on appeal[.]

The court of appeals rejected petitioner's argument based on this Court's reference in *Pearce*, 395 U.S. at 726, to "conduct [on the part of the defendant] occurring after the time of the original sentencing" (Pet. App. A19), that because his conviction on the counterfeit certificates charge was for an offense committed before his first sentencing, it could not provide the basis for enhancement of his sentence. In the court's view (*id.* at A19), that argument "concerns but a part of the means, and ignores the end sought to be achieved in *Pearce*. It exalts words above substance." As the court explained (*id.* at A19-A20, A24):

[A] rigid limitation of increased sentences to those based on misconduct occurring after the first sentencing would needlessly erase relevant information from the sentencing slate, while contributing nothing to the goal of avoiding vindictiveness. \* \* \*

The target in *Pearce* was vindictive sentencing, not defendant misbehavior between trials. No reason exists for applying a phrase in the *Pearce* guidelines to circumstances bearing no relation to the purpose of those guidelines. There is on this record no evidence whatsoever that the enhancement here resulted from vindictiveness of [the district court]. Nor does [petitioner] argue that it did. In such circumstances, an increased sentence neither thwarts the purpose of *Pearce* and its guidelines nor offends constitutional due process considerations.

After carefully reviewing this Court's post-*Pearce* decisions concerning vindictive sentencing, the court of appeals concluded (*id.* at A26-A27) that "where, as here, the record establishes a total absence of any 'realistic likelihood' of vindictiveness, an increased sentence does not offend the Due Process Clause."

#### ARGUMENT

Petitioner contends that the court of appeals' affirmance of the enhanced sentence imposed on him following his appeal conflicts both with this Court's decision in *North Carolina v. Pearce*, *supra*, and with *United States v. Markus*, 603 F.2d 409, 414 (2d Cir. 1979), and *United States v. Williams*, 651 F.2d 644, 648 (9th Cir. 1981). As we show below, however, the decision below comports with both the letter and the spirit of this Court's decision in *Pearce*. Furthermore, the singular facts of the present case are distinguishable from those of the court of appeals decisions on which petitioner relies and make it an unsuitable vehicle for further definition of the contours of the *Pearce* prophylactic rule.

Petitioner bases his contention (Pet. 12) that a sentence may not be enhanced on retrial to take into account an intervening conviction unless the underlying offense also was committed during the interim between the two trials on the following emphasized language from the Court's opinion in *Pearce* (395 U.S. at 726; emphasis added):

[W]henver a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning *identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.*

In a case such as the present one, however, in which, as petitioner acknowledges (Pet. 13-14), the enhanced sentence is the result of the defendant's intervening nolo contendere plea, the enhancement is literally based upon "identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding" (395 U.S. at 726). In any event, petitioner ignores other language from *Pearce* (395 U.S. at 723; emphasis added; citation omitted) that permits a trial court to impose an enhanced sentence following retrial based on

*events* subsequent to the first trial that may have thrown new light upon the defendant's "life, health, habits, conduct, and mental and moral propensities." Such information may come to the judge's attention from evidence adduced at the second trial itself, from a new presentence investigation, from the defendant's prison record, or possibly from other sources.

As the court of appeals noted (Pet. App. A23 n.6), an intervening conviction clearly is an "event" that sheds new light on a defendant's propensity to violate the law. Accordingly, petitioner's enhanced sentence does not violate even the letter of *Pearce*.<sup>2</sup>

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<sup>2</sup>As the court of appeals suggested (Pet. App. A23 n.6), this Court's references in *Pearce* (395 U.S. at 723, 726) to conduct of the defendant "subsequent to the first conviction" and "occurring after the time of the original sentencing" apparently rest on the assumption that all conduct occurring before the first conviction had been taken into account by the court in setting the first sentence. Such an assumption is inapplicable where, as here, the earlier conduct was deliberately ignored at the first sentencing proceeding. In any event, since in *Pearce* and its companion case the states advanced no reasons for the enhanced sentences, the Court had no occasion in that case to consider the propriety of increasing a sentence on the basis of an intervening conviction for an offense committed before the first sentencing. See 395 U.S. at 726; Pet. App. A22 n.6.

Moreover, petitioner's contention "exalts words above substance" and "ignores the end sought to be achieved in *Pearce*." Pet. App. A19. As the court's post-*Pearce* cases make clear, the prophylactic rule established in that case was designed solely to insure against the hazard of judicial vindictiveness and, thus, against any deterrent effect on a defendant's decision whether to appeal flowing from his apprehension of such a retaliatory motivation. See *United States v. Goodwin*, 457 U.S. 368, 372-377 (1982); *Blackledge v. Perry*, 417 U.S. 21, 25-29 (1974); *Chaffin v. Stynchcombe*, 412 U.S. 17, 24-35 (1973); *Colten v. Kentucky*, 407 U.S. 104, 116-118 (1972); *Moon v. Maryland*, 398 U.S. 319 (1970) (per curiam). " 'The lesson that emerges from *Pearce*, *Colten*, and *Chaffin* is that the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of "vindictiveness." ' " *United States v. Goodwin*, 457 U.S. at 375, quoting *Blackledge v. Perry*, 417 U.S. at 27. Permitting a trial court to enhance a defendant's sentence on the basis of an intervening conviction for an offense committed prior to the original sentencing poses no more likelihood of "vindictiveness" than does enhancement of a sentence based on intervening misconduct.

Similarly, this Court's concern that a defendant not be deterred in the exercise of his appellate rights embodies only the limited interest that a defendant not be deterred from appealing *for fear that the trial court would retaliate against him for doing so by enhancing his sentence following retrial*, not the more generalized concern posited by petitioner (Pet. 16-19, 26) that a defendant contemplating appeal should be entitled to assurance that enhancement of

his sentence could result only from his own intervening misbehavior.<sup>3</sup> Hence, the district court's explanation (page, 4, *supra*) that petitioner's enhanced sentence was based on his intervening conviction on the counterfeit certificates scheme fully satisfied the spirit as well as the letter of this Court's decision in *Pearce*.

Indeed, as the court of appeals noted (Pet. App. A24), petitioner did not even allege vindictiveness on the part of the sentencing court.<sup>4</sup> In *Moon v. Maryland*, *supra*, this Court granted certiorari in order to determine whether the rule announced in *Pearce* should be applied retroactively. The Court dismissed the writ as improvidently granted, however, when it became clear that the petitioner in *Moon* had " 'never contended that [the sentencing judge] was vindictive.' " 398 U.S. at 321. Likewise, the Court should not grant the petition here to construe the rule of *Pearce* in the absence of even an allegation of actual vindictiveness.

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<sup>3</sup>See, e.g., *Colten v. Kentucky*, *supra*. There, the Court refused to apply *Pearce*'s prophylactic rule to an allegation of vindictiveness that arose in a case involving Kentucky's two-tier system for adjudicating less serious criminal charges, whereby a defendant who is convicted and sentenced in an inferior court is entitled to a trial de novo in a court of general jurisdiction, notwithstanding the fact that the latter court "often . . . will impose a punishment more severe than that received from the inferior court." 407 U.S. at 117.

<sup>4</sup>Petitioner suggests (Pet. 20 n.3) that the transcript of the second sentencing proceeding "reveals strong negative feelings against [petitioner]" on the part of the district court. The type of "negative feelings" advanced by petitioner, however — the alleged displeasure of the district court with the sentence imposed on petitioner as a result of the intervening false certificates conviction — has nothing to do with the vindictive retaliation for the taking of an appeal against which *Pearce* and its progeny were directed. Moreover, at the sentencing proceedings on which petitioner relies (Pet. 20 n.3), petitioner's counsel apparently eschewed reliance on the type of vindictiveness with which *Pearce* and related cases were concerned (Pet. App. A45): "First thing is really I'm not suggesting a more harsh sentence, you know, penalize Mr. Wasman for going to trial."

At all events, unique circumstances are present in this case that take it well outside the reach of the *Pearce* prophylactic rule and make the case wholly inappropriate as a vehicle for resolving any unsettled issues regarding the scope of that rule. Pursuant to petitioner's own request, the conduct that underlay his intervening conviction was not considered by the district court at the first sentencing hearing. At that time, petitioner urged that misconduct should not be a factor in sentencing unless and until it resulted in a conviction. By explicitly excluding from the sentencing calculus consideration of the counterfeit certificates scheme, the district court merely followed the procedure suggested by petitioner; this dispels any suggestion that the enhanced sentence following retrial, at which time the previously pending charges had been resolved, was the result of judicial retaliation for the appeal. Especially in these circumstances, *Pearce* should pose no barrier to an enhanced sentence based on an intervening conviction.<sup>5</sup>

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<sup>5</sup>Petitioner also contends (Pet. 21-26) that his sentences have been improperly pyramided because the judge who sentenced him on the intervening counterfeit certificates conviction took into account his conviction at the first passport trial, while the sentencing judge at the second passport trial, in turn, increased his original sentence on the basis of the intervening counterfeit certificates conviction. This contention is factually erroneous. Indeed, the outstanding passport charge inured to petitioner's benefit at the sentencing on the intervening counterfeit certificates conviction. In choosing not to impose a jail term with respect to the latter charge, the sentencing judge explained (Pet. C.A. Br. App. 49; emphasis added):

I think I am going to be lenient with you really because I realize you have been through a lot *and you do have the [passport] sentence facing you \* \* \* on essentially the same [facts].*

Thus, the only one of petitioner's sentences that was enhanced to take into account his proven penchant for fraud was the second passport sentence. In these circumstances, petitioner cannot complain that his sentences were impermissibly pyramided.

For the same reason, the cases relied on by petitioner are distinguishable. In neither *United States v. Markus*, 603 F.2d 409 (2d Cir. 1979), nor *United States v. Williams*, 651 F.2d 644 (9th Cir. 1981), is there any suggestion that the trial court, in originally sentencing the defendant, expressly agreed to a defense request not to consider allegations of prior misconduct that were the subject of a pending prosecution.<sup>6</sup> Hence, even if *Markus* and *Williams* were correctly decided,<sup>7</sup> they would not necessarily avail petitioner, whose enhanced sentence was the result of the district court's acceptance of petitioner's own argument at the original sentencing proceedings, rather than of any "vindictiveness \* \* \* for having successfully attacked his first conviction." 395 U.S. at 725.

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<sup>6</sup>Indeed, in *Williams* the indictment that resulted in the intervening conviction was not filed until after the first sentencing proceeding. 651 F.2d at 646, 648.

<sup>7</sup>We note our view that *Williams* and *Markus* were wrongly decided. As the court below observed (Pet. App. A28), neither *Williams* nor *Markus* examines this Court's subsequent opinions explaining *Pearce*. Nor do they mention that the *Pearce* opinion itself contemplates the sentencing court's consideration of intervening "events." Instead, like petitioner, they rely on isolated language taken out of context from *Pearce* and conclude on the basis of it that a conviction is not "conduct" and that it therefore will not support an enhanced sentence.

**CONCLUSION**

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

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**OCTOBER 1983**